Supreme Court, U.S.
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90-1515

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

GEORGE YARCHAK, AS FATHER AND
ADMINISTRATOR OF THE ESTATE OF
DAVID EVERETT YARCHAK, DECEASED

Petitioner

v.

MUNFORD, INC., ET AL

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA

G. Daniel Evans
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Birmingham, Alabama 35209
205-870-1970
Attorney for Petitioner

ISSUES PRESENTED FOR REVIEW

I. IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT VIOLATED BY A WORKMEN'S COMPENSATION STATUTE WHICH IS MANDATORY IN ITS APPLICATION AND WHICH EXCLUDES ALL OTHER REMEDIES FOR ON-THE-JOB DEATHS BUT WHICH PROVIDES NO BENEFITS TO THE ESTATE OF THE EMPLOYEES WHO ARE KILLED WITHOUT DEPENDENTS?

II. IS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA VIOLATED BY DENYING EMPLOYEES WHO HAVE NO DEPENDENTS AN ADEQUATE REMEDY FOR DEATHS OCCURRING IN THE WORKPLACE?

III. DOES THE COMPULSORY NATURE OF THE WORKMEN'S COMPENSATION STATUTE OF ALABAMA VIOLATE THE RIGHT TO FREELY CONTRACT AS PROVIDED IN ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

LIST OF PARTIES

George Yarchak, as Father and Administrator of the Estate of David Everett Yarchak, deceased;

Munford, Inc.
Majik Market, Inc., a Division of Munford, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner, George Yarchak, as father and administrator of the Estate of David Everett Yarchak, deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered in the above-entitled cause of September 28, 1990 and rehearing denied on November 9, 1990.

I.

OPINION BELOW

The precise issues raised in this Petition for Writ of Certiorari were raised and decided adversely to your petitioner in the case of Yarchak v. Munford, 88-1652, (Ala. Sept. 28, 1990). (Attached as Appendix A)

II.

JURISDICTION

The opinion of the Supreme Court of Alabama, was filed on September 28, 1990.

The petitioner's Petition for Rehearing was denied on November 9, 1990. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257.

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment of the United States Constitution provides:

> Section One - Citizens of the United States.
>
> All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the United States Constitution provides:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debt; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Alabama's Workmen's Compensation Statute Section 25-5-1 et. seq. Code of Alabama (1975) provides the following:

> See Appendix B attached hereto, as the verbatim language in the Act is too lengthy to set out.

Code of Alabama (1940) (Recomp. 1958) Title 26, Sections 270, 271, 272, 273, 274, 275 and 276 provide as follows:

> See Appendix C attached hereto, as the verbatim language is too lengthy to set out in its entirety.

STATEMENT OF THE CASE

The Petitioner, George Yarchak, is the duly appointed administrator of the Estate of his son, David Everett Yarchak, deceased. On November 9, 1988, David applied with Munford, Inc. for a job and was hired as a clerk in one of its convenience stores at 101 Acton Road in Birmingham, Alabama. David Everett Yarchak was twenty-one (21) years old at the time he was hired by Munford, Inc. Subsequently, David began his employment at the convenience store located at 101 Acton Road. That location is an isolated location and despite David's short time with the company, he was assigned to the night shift on the Thanksgiving weekend in November, 1988. No other company personnel were present at that location throughout his shift.

Prior to Thanksgiving weekend, David received practically no training; however,

the sole responsibility of running the convenience store on the eleven to seven shift was thrust upon him.

The convenience store at which David was employed had been the scene of violent attacks on employees in the past. Munford, Inc. had knowledge, or should have had knowledge that the Acton Road location where David was employed was a prime target for violence. It is undisputed that the Acton Road convenience store location had absolutely no warning devices, cameras, alarms, or any other security measure in place to assist its employees in protecting themselves, or discouraging violence on the premises.

Even though Munford knew of the isolated location of the Acton Road store and the previous violence experienced at that store, it assigned David to work the night shift on the Thanksgiving weekend. The night of his death was only the second

time David had worked the night shift during his employment. Due to the fact that it was a holiday weekend, David was given additional cash to keep on hand during the night shift. Munford, Inc. knew or should have known that the holiday assignment given to David would expose him to an unusual risk of assault or attack. David Everett Yarchak was not informed of the previous violent attacks at that location, nor was he provided any means or method to protect himself from harm.

As a result of these conditions, David Yarchak was shot to death while on the job at the Majik Market on November 26, 1988. David's body was discovered several hours after he had been killed.

It is undisputed that David Everett Yarchak was unmarried at the time of his death and did not leave dependents. Neither his estate nor heirs at law have received or sought any benefits provided by

Alabama Workmen's Compensation Act. The estate of David Yarchak filed an action directly against the employer and co-employees for damages pursuant to the Alabama Wrongful Death Statute and for declaratory relief concerning the validity of the Alabama Workmen's Compensation Act.

The lawsuit was filed in the Circuit Court of Jefferson County, Alabama, the Tenth Judicial Circuit. The complaint alleged that the Alabama Workmen's Compensation Statute was violative of the due process clause of the Fourteenth Amendment of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The complaint further alleged that Alabama's Workmen's Compensation Act is in violation of the freedom to contract clause of Article I, Section 10, of the United States Constitution. The petitioner filed the

above mentioned suit on August 3, 1989 on behalf of the estate of his son, David Everett Yarchak, deceased.

At the trial level, the defendants filed a Motion to Dismiss and a Motion for Summary Judgment, respectively. Neither motion contained any affidavits or other factual support, but merely sought dismissal based on the exclusivity provision of the Alabama Workmen's Compensation Act. The Circuit Court of Jefferson County, Alabama granted these motions by final order dated September 21, 1989. On that same day, Yarchak filed his Notice of Appeal to the Supreme Court of Alabama.

Yarchak, on appeal to the Supreme Court of Alabama, again alleged that the Alabama Workmen's Compensation Act was violative of the Fourteenth Amendment of the United States Constitution, in particular the equal protection and due

process provisions. Yarchak also contended that the Alabama Workmen's Compensation Statute violated the freedom of contract clause found in Article I, Section 10 of the Constitution of the United States of America.

The Supreme Court of Alabama entered its ruling on September 28, 1990 holding that the Alabama Workmen's Compensation Statute does not violate the Fourteenth Amendment of the United States Constitution and affirming the trial court's ruling. Thereafter, the Yarchak sought a timely application for rehearing which was denied on November 9, 1990.

ARGUMENT FOR GRANTING THE WRIT

From the outset of this case, the state court has been called upon to review allegations that the Alabama Workmen's Compensation Act was repugnant to the United States Constitution. These constitutional challenges have been based upon the Fourteenth Amendment, due process and equal protection clause, as well as the contract provisions of the Article I, Section 10 of the United States Constitution.

The Alabama Workmen's Compensation Act, like the acts of many other states, was initially justified on aspects of contract. In fact, many of the early challenges to various other states' acts were successful when those acts failed to provide consensual coverage. See National Bank of Tulsa Building v. Goldsmith, 204 Okla. 45, 226 P.2d 916 (1951). Failure to include this contractual aspect was found

to constitute a taking of property without due process. See, e.g., Ives v. South Buffalo Railroad, 201 N.Y. 271, 94 N.E. 431 (1911); Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911). During those early years, it was generally felt that if persons elected to be covered by the Act's provisions and accepted benefits of that coverage, then in such event, any constitutional flaws were waived. See, e.g., New York Central Railroad v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L.Ed. 667 (1917), Woodward Iron Co. v. Bradford, 206 Ala. 447, 90 So. 803 (1921). The elective nature gave parties an option to accept or reject the provisions of the Workmen's Compensation Act and continued to be cited as the Act's underpinning. See Chapman v. Railway Fuel Co., 212 Ala. 106, 101 So. 879 (1924).

Under prior codifications in Alabama, employers and employees were given the

express option either to accept or to reject the coverage of the Workmen's Compensation Act. See Title 26 Sections 270, 271, 272, 273, 274, 275, 276, Code of Alabama, (1940) (Recomp. 1958). Unquestionably, a quid pro quo existed during those periods by requiring the employer and employee to agree whether or not they were to be covered by the Act's provisions. All parties were plainly given notice that their agreement to be covered by the Act would surrender other rights. See Title 26, Section 271, Code of Alabama, (1940) (Recomp. 1958). Title 26, Section 272 plainly stated:

> The rights and remedies herein granted to an employee shall exclude all other rights and remedies of said employee, his personal representative, parent, dependents, or next-of-kin, at common law, by statute or otherwise, on account of said injury, loss of service or death. . . .

On July 10, 1940, a slight amendment

was made to these provisions providing that contracts after January 1, 1941 would be presumed to have been made subject to the provisions of the Act. Nevertheless, Section 274 continued to provide for employer election rejecting the coverage of the Act. Likewise, Section 275 provided for an employee's right to elect the restrictions on his rights in exchange for compensation under the Act.

This type of option continued as part of the fabric of our Workmen's Compensation Act until the amendments of 1973. Act 83-1062 (1973). After those amendments, the above-cited Code sections were all repealed, removing from the Act any election on behalf of the employer or employee as to coverage under the Workmen's Compensation Act. No longer was the Act based upon agreement or contract between an employer or employee. Under Alabama's present law, all employment contracts are

subject to the provisions of the Workmen's Compensation Act. See § 25-5-54, Code of Alabama (1975)[1].

There is presently no provision in our Act allowing either an employer or employee to opt out of the so-called system of compensation. Yet, the provisions of the Act specifically provide that all other remedies and claims of an injured employee or his heirs are exclusively barred. See § 25-5-53, Code of Alabama (1975). Clearly the Act is no longer contractual nor elective. It is simply imposed upon every employment relationship in Alabama where the employment of more than three (3) individuals occurs. No longer is an employer or employee given the right to contract in employment relationships free of the requirements of the Workmen's

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[1]There are certain listed exceptions in the Act itself, including employers with less than three (3) employees - none of which is pertinent here.

Compensation Act. Since the 1973 amendment, the Act clearly infringes upon individual rights to contract freely. These rights are protected by Article 1, Section 10, of the United States Constitution.

At the outset, public policy justifications and quid pro quo were used for the Act's legislative foundation. Injured employees were no longer required to prove negligence and other requirements of causes of action, but were nevertheless given recovery, albeit at a reduced rate, for on-the-job injuries. Likewise, employers were relieved of the defense of such lawsuits, but were required to shoulder the financial impact of compensating work-related injuries and deaths. Obviously recognizing the imperfection of this scheme, the Legislature, until 1973, allowed employers and employees to forego coverage of the Act

in favor of our statutory and common law precepts. See generally, Comment, Election and Coemployee Immunity Under Alabama's Workmen's Compensation Act, 31 Ala. L. Rev. 1 (1979). Now that coverage is mandatory for both parties, the question arises as to its constitutional foundation.

The Alabama Legislature's repeal of all sections dealing with election, if given any meaning, proves undeniably that this Act is no longer elective. The imposition of this compulsory statutory scheme upon every employment relationship is repugnant to Article I, Section 10 of the United States Constitution.

In the case at bar, the facts present a wrongful death action for the work-related death of an employee who was single with no dependents at the time of his death. The Workmen's Compensation Act provides no benefits whatsoever to such an individual, yet by its exclusivity

provisions, bars any action outside the Act against the employer or co-employees. As discussed above, without indulging the strangest of legal fictions, the acceptance of these provisions is imposed upon both the employer and employee alike. There is no contract except for employment itself. No election is made by these parties to be bound by the Act's provisions. Yet, by acceptance of employment alone, a single employee without dependents immediately relinquishes for himself and his heirs any wrongful death action in this State. Regardless of the egregious nature of the employee's death, if the decedent has no spouse nor dependents, there exists no remedy. Despite the wrong and resulting damage, no remedy is provided. Without question, this flaw makes it cheaper to "kill than to injure". See Hughes v. Decatur General Hospital, 514 So. 2d 935, 939 (Ala. 1987) (Jones, J. concurring

specially).

Wrongful death has been codified within the State of Alabama since 1852. The present Alabama Constitution was adopted in 1901. At that time, our State had already enjoyed five previously codified wrongful death acts. In short, Alabama has long recognized wrongful death to be an accepted part of the fundamental remedies available in this State.

Yet, under present Alabama statutory law, this action of wrongful death is denied to that class of individuals who die in the course of their employment without dependents. The death compensation provisions of the Workmen's Compensation Act in Alabama have remained essentially the same for over 50 years. See § 25-5-60, Code of Alabama (1975); Title 26, § 283 Code of Alabama, (1940) (Recomp. 1958). Under neither the present code nor prior codifications did the compensation scheme

provide any benefits upon the death of a single employee who died without dependents. When the Act was still elective, this denial of benefits arguably could be supported because the employee had an election. However, since 1973, the elective aspect, as indicated above, has been removed. A class of individuals is carved out by the patchwork of amendments made to the Alabama Act, such that the death of an individual on the job, regardless of how egregious the acts may have been leading to their death, gives no right whatsoever to their heirs for the wrongful death. These heirs are denied any opportunity to elect to the contrary, nor are they given any compensation for the relinquishment by statute of these rights.

This class, admittedly not of a suspect nature, can only be justified if its establishment is reasonably related to a legitimate state interest implemented

through the exercise of the State's police power. Since the elective nature of the Act was foreclosed once and for all by the 1973 amendments, this Court's review should be particularly directed to justifications present in 1973. There was not any justification in 1973 nor at present for the denial of a wrongful death action to this class of individuals. What possible "legitimate state" reason could exist for the legislature to carve out a class of individuals constituting only the heirs of employees who die without dependents in work related accidents as being the only persons in the state denied some remedy for the wrongful death of their heir? It cannot logically be argued that this provision exists for any legitimate state purpose.

Even under a companion state statute called "The Employer's Liability Act", an action exists for the death of all

employees. See § 25-6-1, et. seq., Code of Alabama, (1975). That Act, although not applicable here, has no similar requirement of dependency as is contained in the Workmen's Compensation Act. The dependency of the surviving heir is not a predicate for action under the Alabama Statutory Wrongful Death Act. See § 6-5-410, Code of Alabama, (1975). Likewise, under The Employer's Liability Act referenced above, no such impediment exists to recovery. See § 26-6-3, Code of Alabama, 1975. How then can the Alabama Legislature be deemed to have acted rationally in depriving compensation under the Workmen's Compensation Act to non-dependent heirs, while at the same time denying those heirs any other statutory recourse as well.

Under the Alabama Wrongful Death Act, only punitive damages are provided. Obviously, compensation is not the purpose of the Alabama Wrongful Death Act. Rather,

as our pattern jury charges require, the juries are instructed that the protection of human life is at the core of the statute. Only wrongful conduct justifying punitive damages will result in any award whatsoever. How, then, can a compensation statute, such as the Workmen's Compensation Act of Alabama, justify a statutory scheme denying death benefits to those without dependents, which likewise denies the opportunity to show wrongful conduct justifying punitive damages. Simply no justification exists for the disparate treatment and its consequent evisceration of personal rights enjoyed by all other citizens in the State of Alabama.

During the infancy of workmen's compensation in this country, this Court reviewed early constitutional challenges to one of the first workmen's compensation acts in the country. See New York Central Railroad Company v. White, 243 U.S. 188, 37

S.Ct. 247, 61 L.Ed. 667 (1917). These early challenges were generally brought by employers contending property was taken from them without benefit of due process due to the right of the employees to collect benefits without a finding of fault. The elective nature of these earlier acts generally saved them. A similar issue was also addressed by this Court in Sheehan Co. v. Shuler, 265 U.S. 371 (1924). In the Sheehan case, an employer again brought a charge that the New York Workmen's Compensation Act denied it due process. By the time of that challenge, the Act challenged required a compulsory contribution to a state fund on certain employee deaths. The state then made a payment over to survivors of a deceased employee for death benefits. Although the facts in that case presented an employee dying without survivors, there is no mention in the opinion concerning any

issue touching upon the denial of other remedies.

From a review of the state decisions on this matter, it is apparent that the great number of workmens compensation acts exclude benefits for the death of individuals dying without dependents. See Taylor v. Southeast Harrison Western Corporation, 694 P.2d 1160 (Alaska 1985). Also see Snow v. United States, 479 F.Supp. 936 (D.Nev. 1979); Slagle v. Reynolds Metal Company, 344 So.2d 1216 (Ala. 1977); Stample v. Idaho Power Company, 92 Idaho 763, 450 P.2d 610 (1969); Leech v. Georgia Pacific Corp., 259 Or. 161, 485 P.2d 1195 (1971); West v. Zeibell, 87 Wash. 2d 198, 550 P.2d 522 (1976); See also, Vol. 2A, Larson, The Law of Workmen's Compensation, Section 65.54 (1983). The exclusivity of the remedy and the denial to these heirs of any other statutory provided remedy has generally not been critically discussed.

In one of the few cases concerning equal protection challenges on this issue, (albeit on state grounds), the New Hampshire Supreme Court found that a statutory scheme denying benefits to the heirs of a deceased employee who has no dependents is violative of the concept of equal protection since nothing was given in turn for eliminating any other rights of action. See Park v. Rockwell International Corp., 121 N.H. 894, 436 A.2d 1136 (1981). Clearly, the reasoning of this view is sound.

The Alabama Workmen's Compensation Act, in its present state, is a result of a myriad of amendments taking place over many years. It is, by express provision, non-severable. That statute, since 1973, is compulsory in every employment relationship involving more than three employees in Alabama. It provides an exclusive remedy for any on-the-job injuries or death, and

by its plain terms, prohibits other statutory and common law remedies available to other injured persons in this State. Only those persons dying on the job without dependents are deprived any remedy.

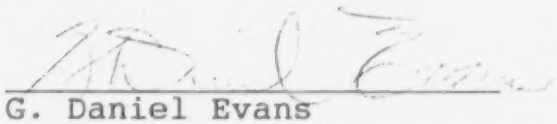
Your petitioner is very mindful of the great number of requests made upon this Court and the demands on this Court's limited resources. For these reasons, this request is not lightly undertaken. The fundamental unfairness perpetrated by the present Alabama scheme and the exhaustion of all other avenues of redress, have left this Court as the only remaining stalwart for the protection of these constitutional rights. It is obvious from review of other state provisions that these statutory schemes are pervasively used and imposed with similar application in other states. Your petitioner earnestly requests this Court to visit its wisdom upon this area and to prevent other similarly situated

individuals from being needlessly denied access to other legal relief, none of which would frustrate the laudable purposes of workmen's compensation.

CONCLUSION

Wherefore, based upon the above-cited authorities and reasons, your petitioner prays that the Court will issue the writ to the Supreme Court of Alabama.

RESPECTFULLY SUBMITTED,



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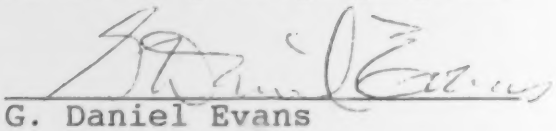
CERTIFICATE OF SERVICE

I hereby certify that on this the 7 day of February, 1991, I mailed a copy of the above and foregoing Petition for Writ of Certiorari to The Attorney General of the State of Alabama, Office of the Attorney General, Montgomery, Alabama

36130, and to Donald D. Lusk, Esquire, McDaniel, Hall, Conerly & Lusk, P.C., 1400 Financial Center, Birmingham, Alabama 35203, first class mail, postage prepaid.



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